UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GUY CARRIER, et al.,	***)***	
	)	
Plaintiffs	***)***	
	)	
v.	***)***	***Docket No. 01-187-P-C***
	)	
JPB ENTERPRISES,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON MOTION TO DISMISS

The defendant, JPB Enterprises, moves to dismiss Count II of the complaint,[1] which alleges violation of 26 M.R.S.A. § 625-B. I recommend that the court grant the motion.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). Motion at 1. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [its] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

[1] The defendant also moved to dismiss Count V. Defendant's Motion to Dismiss Counts II and V of Complaint, etc. ("Motion") (Docket No. 4) at 5-15. The plaintiffs did not object to dismissal of Count V. Plaintiffs' Opposition to Defendant's Motion to Dismiss, etc. ("Plaintiffs' Opposition") (Docket No. 6) at 2. The court dismissed Count V on November 14, 2001. Order Dismissing Count V, with Consent, etc. (Docket No. 13).

II. Factual Background

The complaint includes the following relevant factual allegations. The named plaintiffs are residents of the State of Maine and were employed by Maine Poly, Inc., a wholly-owned subsidiary of the defendant. Complaint (Docket No. 1) ¶¶ 1, 4. Maine Poly is a Maine corporation which did business in Greene, Maine ; the defendant is a Maryland corporation. *Id*. ¶ 5. Maine Poly employed over 100 employees from April 2000 until it began layoffs on or about June 29, 2001. *Id*. ¶ 17. It is an "employer" within the meaning of 26 M.R.S.A. § 625-B(1)(C). *Id*. ¶ 18. The defendant is also an "employer" within the meaning of this statute. *Id*. ¶ 25.

Beginning on or about June 29, 2001 and continuing thereafter, Maine Poly terminated the jobs of at least 120 employees. *Id*. ¶ 28. Since on or about July 6, 2001 there has been a substantial cessation of industrial and commercial operations at Maine Poly. *Id*. ¶¶ 31-32. Maine Poly failed to pay employees their last week of wages and accrued vacation pay as of July 12, 2001, the first regularly scheduled pay day following the closing or mass layoff. *Id*. ¶ 33.

The plaintiffs seek severance pay pursuant to 26 M.R.S.A. § 625-B(1)(C) and (2). *Id*. ¶ 40.

III. Discussion

The state statute at issue provides, in relevant part:

> **1. Definitions.** As used in this section, unless the context otherwise indicates, the following words shall have the following meanings.
>
> **A.** "Covered establishment" means any industrial or commercial facility or part thereof which employs or has employed at any time in the preceding 12-month period 100 or more persons.
>
> * * *
>
> **C.** "Employer" means any person who directly or indirectly owns and operates a covered establishment. For purposes of this definition, a parent corporation is considered the indirect owner and operator of any covered establishment that is directly owned and operated by its corporate subsidiary.
>
> * * *

> **E.** "Physical calamity" means any calamity such as fire, flood or other natural disaster, or the final order of any federal, state or local governmental agency including adjudicated bankruptcy.
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> * * *
>
> **G.** "Termination" means the substantial cessation of industrial or commercial operations in a covered establishment.
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> * * *
>
> **2. Severance pay.** Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. The severance pay to eligible employees shall be in addition to any final wage payment to the employee and shall be paid within one regular pay period after the employee's last full day of work, notwithstanding any other provisions of law.
>
> **3. Mitigation of severance pay liability.** There is no liability under this section for severance pay to an eligible employee if:
>
> **A.** Relocation or termination of a covered establishment is necessitated by a physical calamity . . . .

26 M.R.S.A. § 625-B.

The defendant, conceding that Maine Poly was a "covered establishment" within the meaning of section 625-B(1)(A), contends that its filing of a voluntary petition for relief under Chapter 7 of the bankruptcy code was a "physical calamity" within the meaning of section 625-B(1)(E). Motion at 15. Attached to the motion is a copy of the docket sheet from the United States Bankruptcy Court for the District of Maine for the Chapter 7 voluntary filing of petition number 01-21125, filed July 11, 2001 by Maine Poly, Inc., indicating that the matter remained pending as of August 29, 2001. Motion, Exh. 2.[2] The plaintiffs argue in response that the term "adjudicated bankruptcy" in the statutory definition of a physical calamity is meaningless because it does not appear in the federal bankruptcy code and Maine case law suggests that it is "devoid of meaning." Plaintiffs Opposition at 4-7. In the

[2] The plaintiffs do not object to the court's consideration of this material in connection with a motion to dismiss. In any event, matters of public record may be considered without converting the motion into one for summary judgment. *Boateng v. Interamerican Univ., Inc.*, 210 F.3d 56, 60 (1st Cir. 2000).

alternative, they assert that the defendant, not its subsidiary Maine Poly, must file for bankruptcy in order for their claims to be barred by section 625-B(3). *Id*. at 7-11.

The Maine statute at issue was enacted in 1975. Historical Note, 26 M.R.S.A. § 625-B. At that time the term "adjudicated bankruptcy" was included in the federal bankruptcy code; it was replaced with the phrase "order for relief" when the code was substantially revised in 1978. Historical and Statutory Notes, 11 U.S.C. § 301. The filing of a voluntary petition in bankruptcy results in an automatic adjudication that the debtor is a bankrupt. *In re Greetis*, 98 B.R. 509, 513 (S.D. Cal. 1989); *Brick Constr. Corp. v. CEI Dev. Corp.*, 710 N.E.2d 1006, 1008 (Mass. App. 1999) (citing cases). Thus, Maine Poly's filing of a voluntary petition under Chapter 7 appears to constitute an "adjudicated bankruptcy."

The plaintiffs contend that *City of Saco v. Pulsifer*, 749 A.2d 153 (Me. 2000), "compels the conclusion that the Court cannot readily substitute a mere filing of the bankruptcy petition for an actual adjudication." Plaintiffs' Opposition at 5. This is so, they suggest, because the terms "adjudicated bankruptcy" and "order for relief" cannot be used interchangeably and the former is now "meaningless." *Id*. at 7. In *Pulsifer*, the Maine Law Court construed 14 M.R.S.A. § 866, a statue of limitations which provides in relevant part:

> If a person is adjudged an insolvent debtor after a cause of action has accrued against him, and such cause of action is one provable in insolvency, the time of the pendency of his insolvency proceedings shall not be taken as a part of the time limited for the commencement of the action.

Id. at 155. The Law Court noted that the language in this portion of section 866 "first appeared more than a hundred years ago, in 1887" and "exactly tracks the language of the now ancient [Maine] Insolvency Act [of 1878]." *Id*. At that time, bankruptcy was a matter governed by state law. *Id*. The Law Court noted that the present federal bankruptcy code has no analogue to debts "provable in insolvency" and to "adjudg[ing] [an individual] an insolvent debtor." *Id*. Stating that the court

"do[es] not have unfettered discretion to redraft statutory language that has as its subject other legislation that has long since been repealed," the Law Court declined to give section 866 meaning by replacing references to insolvency with "analogous references applicable under the current system." *Id*. "As the trial court concluded, the language of section 866 simply does not have meaning in the modern bankruptcy context." *Id*. That is not the case with 26 M.R.S.A. § 625-B, where the reference is to a term included in a statute that was repealed twenty-three years ago — hardly an "ancient" statute — and the term at issue does have meaning in the modern bankruptcy context, as demonstrated by the historical note printed with the current version of the code and the congressional reports to which that note refers. *Pulsifer* does not direct the conclusion that the term "adjudicated bankruptcy" in section 625-B is meaningless. While greater attention by the Maine legislature to changes in terminology resulting from the 1978 recodification of the federal bankruptcy code would obviously be advisable, this particular relic of the prior version of the code continues to have meaning that is fairly easily ascertained. Bankruptcy has not been read out of section 625-B(c) by *Pulsifer*, the legislature's inaction or the mere passage of time.

The plaintiffs next contend that it is JPB, admittedly otherwise liable as Maine Poly's corporate parent for the severance pay due under section 625-B(2), which must be "adjudicated bankrupt" rather than Maine Poly for the section 625-B(3)(A) exception to apply. They cite the following *dicta* from *State of Maine v. L.V.I. Group*, 690 A.2d 960 (Me. 1997), in support of this position:

> Additional contentions of LVI, that LVI is not a parent corporation of Dori Shoe within the meaning of section 625-B, that the court erred in its determination of severance pay, and that LVI is not liable for severance pay because Dori Shoe terminated its operation due to a physical calamity as defined in section 625-B(1)(E), are without substantial merit.

Id. at 966. The plaintiffs assert that "the Law Court's comment rejecting the contention that Dori Shoe had suffered a physical calamity strongly intimates that where a subsidiary fails but the parent remains an ongoing entity, the parent corporation cannot avail itself of the physical calamity exception." Plaintiffs' Opposition at 9. The Law Court's statement cannot bear the weight that the plaintiffs seek to impose upon it. There is no indication in the *L.V.I.* opinion that Dori Shoe ever filed for bankruptcy and indeed no discussion of the evidence, if any, offered by the parent corporation of any event that might meet the definition of physical calamity under section 625-B(1)(E). The Law Court's remark could easily be a reference to a lack of evidence of any such event rather than a holding that a corporate parent cannot avoid liability under the statute when the physical calamity affected only its subsidiary.

It is the language of the state statute itself that must govern. Section 625-B(3)(A) provides that there shall be no liability if termination of a covered establishment is necessitated by a physical calamity. "Covered establishment," unlike the term "employer," is not defined in section 625-B(1) to include a corporate parent. In fact, the definition of "employer" clearly concerns an entity separate and distinct from a "covered establishment." This distinction is crucial. In addition, the complaint does not allege that JPB is itself a "covered establishment." Accordingly, Count II of the complaint fails to state a claim on which relief may be granted.

IV. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss Count II of the complaint be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 26th day of December, 2001.

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David M. Cohen
United States Magistrate Judge

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